78-268

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

LUKE GILLESPIE,

Petitioner,

—against—

GLORIA SCHWARTZ, WILLIAM SCHWARTZ, and BOSTON HOSPITAL FOR WOMEN,

Respondents.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Petitioners,

—against—

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Luke Gillespie, Superior Motor Express, Earnhardt Lumber Co. and the Estate of Kenneth Edward Bentley, respectfully pray that a Writ of Certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 12, 1978.

Opinion Below

The opinion of the Court of Appeals, *sub nom. O'Connor* v. *Lee-Hy Paving Co., inter alia,* not yet reported, appears in the Appendix hereto. The judgment and order of the United States Court of Appeals, Second Circuit, dated June 12, 1978, is found in the Appendix. The endorsement order of District Judge Morris E. Lasker in the action entitled *Schwartz* v. *Boston Hospital for Women, et al.,* in the United States District Court, Southern District of New York, not reported, appears in the Appendix hereto.

The memorandum and order of District Judge Eugene H. Nickerson in the action entitled *Kotsonis* v. *Superior Motor Express, et al.* in the United States District Court, Eastern District of New York, not reported, appears in the Appendix hereto.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on June 12, 1978. No petition was filed to said Court by petitioners herein for rehearing *en banc.* This petition for a Writ of Certiorari is being filed within 90 days from the entry of the order of the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1251(1).

Questions Presented

1. Has the decision of this Court in *Schaffer* v. *Heitner,* 433 U.S. 186, and the rule enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310, rendered unconstitutional *quasi-in-rem* jurisdiction, obtained by attachments of public liability insurance policies of non-resident defendants pursuant to the authority of *Seider* v. *Roth,* 17 N.Y. 2d 111?

2. Is the mere presence of a non-resident's public liability insurance carrier in the forum state sufficient to satisfy the contact requirements, enunciated in *Schaffer* v. *Heitner,* 433 U.S. 186, for jurisdiction over an insured who has no contact with the forum state?

3. Is it constitutionally proper under the guidelines, set forth by this Court, for a non-resident defendant to be subjected to the jurisdiction of a Court where the sole method of obtaining jurisdiction over him by a resident plaintiff of the forum state is predicated solely upon the attachment of a policy of public liability insurance, issued by a company which resides in the forum state, and where the only means of the resident plaintiff subjecting the non-resident insured defendant to jurisdiction in the forum state is the attachment of the policy?

4. Is it proper for a Court to *create* a "direct" action against a public liability insurance carrier, which procedure in and of itself is prohibited by the statutes of the forum state, to justify subjecting a non-resident defendant, the insured, to jurisdiction in the forum state and to thereby deprive the insured, the defendant, of substantial rights he has in the subject matter of the action?

Statutory Provisions Involved

Federal Rules of Civil Procedure:

Rule 64:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in

the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Rule 4(e):

"*Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state,

service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

New York Civil Practice Law and Rules (McKinney's Consolidated Laws of New York Annotated):

Section 6223:

"Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action."

Section 5201:

"(a) *Debt against which a money judgment may be enforced.* A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

"(b) *Property against which a money judgment may be enforced.* A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future

right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

"(c) *Proper garnishee for particular property or debt.*

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the uniform commercial code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee."

Insurance Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated):

Section 167(1)(b):

"A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract, shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

Statement of the Cases

This joint petition is brought by petitioners, who were defendants in two separate actions, instituted by the respondents, the respective plaintiffs therein, in the United States District Court, Southern District of New York and the United States District Court, Eastern District of New York, respectively, pursuant to 28 U.S.C. Section 1332. A single petition is herewith filed pursuant to Rule 23(5) of the Rules of this Court on the grounds that the cases in-

volve identical questions of law, and the order of the United States Court of Appeals for the Second Circuit, dated and entered June 12, 1978, determined the issues in each case.

With respect to the petitioner, Luke Gillespie, the action was commenced in the United States District Court, Southern District of New York, by respondents, Gloria Schwartz and William Schwartz (hereinafter referred to as "Schwartz"), based upon a claim for personal injuries and loss of services arising out of alleged acts of medical malpractice which are said to have taken place at the Boston Hospital for Women, Boston, Massachusetts, during and prior to November 1966. It is alleged that petitioner, Luke Gillespie (hereinafter referred to as "Gillespie"), treated respondent Gloria Schwartz during her confinement for the birth of her child at the aforesaid Boston Hospital for Women during the aforesaid period.

At the time of the commencement of the action in the District Court, respondents, "Schwartz", were residents of the State of New York and the action was brought in said Court based solely upon the diversity of citizenship of the parties. *It is uncontroverted that, prior to and subsequent to the commencement of the aforesaid action, petitioner "Gillespie" was a resident of the State of Massachusetts and had no contacts of any kind with the State of New York.*

Prior to the service of process upon petitioner, "Gillespie," respondents, "Schwartz," sought and obtained an order of attachment which provided for the attachment of a policy of public liability insurance, issued to petitioner, Gillespie, by the Lumbermens Mutual Casualty Company, for the purpose of obtaining quasi-in-rem jurisdiction over the petitioner, Gillespie. Said order of attachment was granted on April 7, 1971. The attachment of the aforesaid

policy of public liability insurance was based upon the decision of the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111.

Subsequent to the decision by this Court in *Schaffer* v. *Heitner*, 433 U.S. 186, petitioner, Gillespie, sought an order, pursuant to Rule 64 FRCP and Section 6223 NYCPLR, vacating and setting aside the order of attachment on the ground that said order of attachment violated the due process clause of the United States Constitution and for other related relief. Said application was denied by Judge Morris E. Lasker in an endorsement order dated October 21, 1977, found in the Appendix.

With respect to the petitioners, Superior Motor Express, Earnhardt Lumber Co. and the Estate of Kenneth E. Bentley, an action was commenced by respondent, Fontini Kotsonis (hereinafter referred to as "Kotsonis"), in the United States District Court, Eastern District of New York, against the aforesaid petitioners (hereinafter referred to as "Superior"), based upon a claim of conscious pain and suffering and wrongful death of the decedent, Padias Kotsonis, as a result of a motor vehicle accident which occurred in the State of Maryland on February 24, 1976, based solely upon the ground of diversity of citizenship. Prior to the service of process upon "Superior", respondent, Kotsonis, obtained a supplemental order of attachment which provided for the attachment of a policy of motor vehicle public liability insurance, issued by the Kemper Insurance Companies to petitioner, Superior, for the purpose of obtaining quasi-in-rem jurisdiction over petitioners, Superior. It is to be noted that at the commencement of the action and prior thereto, petitioner "Superior" were citizens and residents of the State of North Carolina and had no contacts of any kind with the State of New York. Said supplemental order of attach-

ment was granted on September 16, 1977. As in the action involving petitioner, Gillespie, the order of attachment was based upon the decision of the New York State Court of Appeals in *Seider* v. *Roth, supra.* Again, as in the action involving petitioner Gillespie, petitioners, Superior, based upon the decision of this Court in *Schaffer* v. *Heitner, supra,* sought an order vacating and setting aside the supplemental order of attachment on the ground that said order of attachment violated the due process clause of the United States Constitution and for other related relief. Said application was heard by Judge Eugene H. Nickerson who denied the application in a memorandum and order dated December 6, 1977, which is found in the Appendix.

In each of the foregoing matters the District Court certified that the issues involved controlling questions of law as to which there were substantial grounds for differences of opinion (28 U.S.C. Section 1292(b)). Petitions for leave to appeal to the Court of Appeals, Second Circuit, were filed on behalf of each of the petitioners herein and said petitions were granted by said Court. In so doing, the United States Court of Appeals, Second Circuit, *sua sponte* joined said appeals with similar applications in two other non-related matters and heard these appeals jointly.

In its opinion and order dated June 12, 1978, sub nom. *O'Connor* v. *Lee-Hy Paving Corp.,* the United States Court of Appeals, Second Circuit, affirmed the orders of the District Courts in each of the matters under review. In so doing the United States Court of Appeals, Second Circuit, held in essence that the attachment procedure, first enunciated in the State of New York in *Seider* v. *Roth, supra,* wherein jurisdiction over the non-resident insureds was obtained in the District Courts by virtue of an attachment of policy of public liability insurance, did not offend the rule of "fair play and substantial justice," applied by

this Court in *Schaffer* v. *Heitner, supra* to in rem attachment actions.

The reasoning of the United States Court of Appeals, Second Circuit, was based largely upon its prior decision in *Minichiello* v. *Rosenberg,* 410 F. 2d 106, aff'd in rehearing en banc 410 F. 2d 117, cert. den. 396 U.S. 844 and the decision by Judge Dooling in *O'Connor* v. *Lee-Hy Paving Corp.,* 437 F. Supp. 994. The Court of Appeals also determined that, notwithstanding any other "contacts" between the non-resident defendant and the forum state, the fortuitous circumstances that the insurer of such defendant had an office in the forum state wherein it transacted its business was sufficient contact and circumstance to satisfy the rule enunciated in *International Shoe Co.* v. *Washington, supra,* as applied by this Court in *Schaffer* v. *Heitner, supra.* The United States Court of Appeals further determined that the commencement of the action by the attachment of the liability insurance policy was "in fact" a direct action against the insurer, with the insured as only a nominal defendant.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals conflicts with the controlling decision of this Court.

Where, as in the instant petition, the order, sought to be reviewed, conflicts with a controlling decision of this Court, a petition for a Writ of Certiorari has been granted. (Cf. *Schlude* v. *Commissioner,* 372 U.S. 128; *Wilkinson* v. *U.S.,* 365 U.S. 399; *Braen* v. *Pfeifer Transportation,* 361 U.S. 129).

The underlying basis for each of the applications by petitioners herein for a vacatur of the orders of attachment is the decision of this Court in *Schaffer* v. *Heitner, supra,* which in essence overruled the decision by this Court in *Harris* v. *Balk,* 198 U.S. 215 insofar as such decision would apply to attachments creating quasi-in-rem jurisdiction. The decision in *Schaffer* v. *Heitner, supra* ended the dichotomy of conditions precedent for obtaining in personam jurisdiction and in rem jurisdiction and substituted the singular test of "fair play and substantial justice" enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310.

The majority opinion of this Court in *Schaffer* v. *Heitner,* written by Mr. Justice Marshall, which contained an exhaustive review of the principles and judicial sources which preceded this landmark decision, can be summed up in the following portion thereof:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally *unfair to the defendant.* (Emphasis supplied)."

In footnote 39 of Mr. Justice Marshall's opinion it was noted that:

> "It would not be fruitful for us to reexamine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. *To the extent that prior decisions are inconsistent with this standard, they are overruled.* (Emphasis supplied)."

The attachment procedure, adopted by respondents in these actions, had its genesis in two decisions by the New York State Court of Appeals: *Seider* v. *Roth, supra* and *Simpson* v. *Loehmann,* 21 N.Y. 2d 305, motion for rehearing denied 21 N.Y. 2d 990. These decisions provide for a resident plaintiff attaching a policy of public liability insurance, issued by a liability insurance carrier doing business in the State of New York to a non-resident insured defendant, for the purposes of establishing jurisdiction over such defendant in an action arising out of a claim of injury and damages occurring outside of the territorial limits of the State of New York. In so doing the jurisdiction of the Court is based upon quasi-in-rem jurisdiction over such non-resident defendant without subjecting him to the personal jurisdiction of the Court. This procedure has been followed in both the New York State Courts and the United States District Courts in the various Districts of New York (Cf. *Minichiello* v. *Rosenberg,* 410 F. 2d 106, rehearing en banc 410 F. 2d 117, cert. den. 396 U.S. 844; *Donawitz* v. *Danek,* 42 N.Y. 2d 138; *Neuman* v. *Dunham,* 39 N.Y. 2d 999).

Since the development of this procedure by the New York State Court of Appeals in *Seider* v. *Roth, supra,* the procedure has been subject to attack both in the Courts and by commentators on the law.

In the Federal jurisdiction, the United States Court of Appeals, Second Circuit, in *Minichiello* v. *Rosenberg, supra,* was the first Appellate Court to be faced with the question of the application of the due process clause of the United States Constitution to such quasi-in-rem jurisdiction. In the majority opinion of that Court, after rehearing en banc, Circuit Court Judge Friendly commented (410 F. 2d 117):

"Appellants complain we did not adequately focus on the burden to a non-resident of having to defend a personal injury action in another state, conceivably far from his domicile and the place of accident, simply because his liability insurer has chosen to do business there. We find this argument unpersuasive *so long as Harris* v. *Balk*, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905), *stands*." (Italics supplied.)

Judge Matthew Jasen in his concurring opinion in *Donawitz* v. *Danek, supra,* decided June 14, 1977, which by dictum, reaffirmed said Court's continuation of the viability of these attachments, based solely upon the principle of *stare decisis,* observed that such attachments were bottomed upon the decision of this Court in *Harris* v. *Balk, supra.* Judge Jasen then opined that:

"Until such time as the Supreme Court chooses to overrule (Harris v. Balk) and that time may not be far off, State Courts are bound by it."

It is manifestly clear that the intent of this Court, in vitiating the dichotomy between the principles of *Harris* v. *Balk, supra* and *International Shoe Co.* v. *Washington, supra,* was to create in the field of jurisdiction by attachment the requirement, certainly at least by inference with respect to attachments of public liability insurance policies, that the proposed defendant must have some other contacts with the forum state in addition to the fortuitous circumstance of the presence of his public liability insurance carrier in said state. This is clear from the decision of this Court in *Rush* v. *Savchuk,* —— U.S. ——, 97 S. Ct. 2964.

In *Rush* v. *Savchuk, supra,* this Court was requested to grant a petition for Writ of Certiorari for review of a judgment of the Supreme Court of the State of Minnesota

(*Savchuk* v. *Rush,* 245 N.W. 2d 624). In response to that petition this Court vacated the aforesaid judgment and remanded the matter to the state court

"*for further consideration in light of Schaffer* v. *Heitner* (citation omitted)."

A review of *Savchuk* v. *Rush, supra,* reveals that the Supreme Court of Minnesota had affirmed the granting of an order of attachment of a policy of public liability insurance issued to the non-resident defendant-petitioner for the purpose of establishing quasi-in-rem jurisdiction. Certainly, this Court desired the state court to which it remanded the case to appraise the "contacts" the *defendant* had with the forum state.

The decision of the United States Court of Appeals, Second Circuit, under review reveals that the Court below failed to apply the principles enunciated in this Court's decision in *Schaffer* v. *Heitner, supra* and *International Shoe Co.* v. *Washington, supra,* and its own decision in *Minichiello* v. *Rosenberg, supra.* In so doing the United States Court of Appeals ignored the salient fact that the petitioners herein had no contacts with the forum state other than the presence of their insurance carrier within the State of New York.

It would appear that in arriving at its conclusions that the attachment procedure comports favorably with the due process clause of the United States Constitution, the Court below chose by way of convoluted reasoning to transform such an action into a judicially created "direct action" against the insurer and reasoned further that the non-resident defendant insured was merely a nominal defendant with no rights other than to be subjected to the requirements of his insurer to participate as a "witness" in the proceedings. This Court's attention is respectfully

directed to the provisions of the Insurance Law of the State of New York Section 167(1)(b) which provides for the sole and only basis upon which a "direct action" can be maintained against the public liability insurance carrier. No other action is permissible under the laws of the State of New York and the New York State Constitution (Article VI). (*Thrasher* v. *U.S. Liability Insurance Co.*, 19 N.Y. 2d 159).

Judge Scilleppi in his opinion in *Thrasher* v. *U.S. Liability Insurance Co., supra,* in commenting upon the foregoing principles stated, in part, as follows:

> "The Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed. (N.Y. Const., art. VI). A direct action suit against an insurer provided for by Section 167 (sub. 1, par. (b)) of the Insurance Law is a cause of action which was unknown to the common law. (Royal Ind. Co. v. Travelers Ins. Co., 244 App. Div. 582, 280 N.Y.S. 485, aff'd. 270 N.Y. 574, 1 N.E. 2d 337)."

The United States Court of Appeals, Second Circuit, further cast aside the clear intention of this Court's decision in *Schaffer* v. *Heitner* to determine the propriety of the Court's jurisdiction in light of fairness *to the defendant* by finding that:

> "Here the sufficient basis (for jurisdiction) is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damage will be more readily available and the fact that in the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought

> at the site of the accident or the residence of the insured."

As part of the convoluted reasoning of the Court below, in justifying the propriety of the attachment proceedings, the Court in effect determined without comment that the *res* attached i.e., the policy of public liability insurance, is in fact an attachable asset of the insured non-resident defendant sufficient to satisfy the attachment statute (Section 5201, subdiv. (b) NYCPLR). It is submitted that there is in fact no attachable "debt" with respect to the public liability policy since it is at best an inchoate contractual obligation, personal in nature, between the insured and the insurer (*Simpson* v. *Loehmann*, 21 N.Y. 2d 314). Judge Jasen in *Donawitz* v. *Danek, supra,* held that the policy of public liability insurance so attached "has no real economic significance. * * * It is unassignable and execution upon it would be most impracticable." All of the foregoing leads to the unavoidable conclusion, as found by Judge Breitel in his concurring opinion in *Simpson* v. *Loehmann, supra,* that the propriety of the attachment procedure herein under review is based upon circular or "bootstrap" reasoning.

It is interesting to note that the United States Court of Appeals, in its footnote 4 of its decision in the case *sub judice,* appears to be unsettled in its conclusions and leaves open a further review of the merits of the attachment procedure evolved from *Seider* v. *Roth supra* by the New York Court of Appeals "in light of the general illumination afforded by *Schaffer* or otherwise, * * *" to determine whether the continued existence of such procedure "is undesirable as a matter of New York law." It is submitted that the Court of Appeals begs the very question placed before it by the petitioners herein and hopes for further resolution of the issues by the New York

State's highest court. It is fundamental that in an action involving diversity of citizenship the Federal Courts are bound to apply the laws and decisional rules of both the forum state and the Federal jurisdictions where applicable (Cf. *Podolsky* v. *Devinney*, 281 F.Supp. 488, and the cases cited therein). However, in the absence of a determination by the Court of ultimate appellate jurisdiction of the state the Federal Court must determine for itself the manner in which such ultimate appellate court would determine the issue before it. (*Trail Builders Supply Co.* v. *Reagan*, 409 F.2d 1059, supplemented 410 F.2d 763; *Imperial Enterprises, Inc.* v. *Fireman's Fund Ins. Co.*, 535 F.2d 287).

It is thus submitted, that the Court of Appeals improperly concluded that the rule of "fair play and substantial justice" enunciated by this Court in *International Shoe Co.* v. *Washington* and applied in *Schaffer* v. *Heitner*, *supra*, have been met by the invocation of the District Court's jurisdiction over the non-resident petitioners herein by virtue of an attachment of said petitioner's policy of public liability insurance.

An eminent commentator, Professor Joseph M. McLaughlin, in his article in the New York Law Journal of July 14, 1978, in treating with the decision by the United States Court of Appeals for the Second Circuit in this case, indicates that holding the insured, the defendant, to be a nominal party is jurisdictional legerdemain with which reasoning he has difficulty. He indicates that it is disingenuous to assert that a direct action against the insurance company does not burden the named defendant in view of the fact that the named defendant is obligated to come to New York to participate in the litigation *even though he may never have been in this state, has no other contacts with New York and he is deprived of something*

substantial by having the trial of the action against him brought in a foreign forum. His substantial rights with respect to the impleader of other defendants may be prejudiced. He sums up the untenability of the decision of the Court below in stating that

> "If the lesson of *Shaffer* v. *Heitner* is that there must be a contract (sic) between the defendant and New York so that the maintenance of the law suit does not offend traditional notions of fair play, I have serious doubts as to whether the insured is being treated fairly."

If there were an accident between an automobile of A and a passenger bus in which there were 50 passengers of citizenship, diverse from that of A, it is conceivable under the reasoning of the United States Court of Appeals that A could be subjected to an action in 50 states merely by the attachment of his automobile policy, issued by an insurance company which has an office in each of the 50 states. This certainly offends any ordinary notions of fair play.

II.

The decision below conflicts with prior decisions of other federal Courts of Appeal.

Where, as in the instant petition, a decision by a Court of Appeals conflicts with decisions of sister circuits, this Court may grant a petition for certiorari to resolve the apparent conflicts (*Avco Corp.* v. *Aero Lodge*, 390 U.S. 557; *Northeastern* v. *U.S.*, 387 U.S. 213). It is submitted that the order and decision herein under review is in substantial conflict with the decisions by the United States Court of Appeals, Fifth Circuit, in *Kirchman* v. *Mikula*,

443 F. 2d 816 and the United States Court of Appeals, Third Circuit, in *Robinson* v. *O. F. Shearer & Sons Inc.*, 429 F. 2d 83.

In *Kirchman* v. *Mikula, supra,* and *Robinson* v. *O. F. Shearer & Sons, Inc., supra,* each of the Federal Courts of Appeals involved, determined, based upon the principles enunciated in *Seider* v. *Roth, supra,* that the method sought to obtain jurisdiction over the non-resident defendant was improper.

The United States Court of Appeals, Second Circuit, in *Minichiello* v. *Rosenberg, supra,* as commented upon in Point I hereinabove, determined that such procedure would be proper "so long as *Harris* v. *Balk* (citations omitted) stands." It is manifestly clear that *Harris* v. *Balk, supra,* no longer applies to in rem jurisdiction by way of attachment where there are no other contacts of the defendants with the forum state. The United States Court of Appeals should have found in the case at bar that the attachment procedure, pursuant to *Seider* v. *Roth, supra,* without any other contacts of the defendant with the forum state, contravenes the due process clause of the United States Constitution.

In light of these conflicts among sister Courts of Appeal, it is urged that the issues should be resolved by this Court so that a uniform body of law may evolve protecting defendants who have no contacts at all with the forum state, other than the presence of their liability insurance carrier, in order that such defendants are afforded the protection provided in the United States Constitution.

III.

The decision below raises significant and recurring federal constitutional problems concerning jurisdiction over non-resident defendants.

In the present state of our mobile society in the United States it is manifestly clear that the citizens of the various states may for one reason or another become involved in accidents far from home giving rise to various and prolific causes of action. The result of such occurrences poses the problem of the selection and choice of the forum in which such disputes may be resolved. One need only refer to the decisions, quoted by the United States Court of Appeals in its decision (Appendix P. 10a), setting forth merely those cases which have arisen in the State of New York subsequent to the enunciation of this Court's decision in *Schaffer* v. *Heitner,* as well as the well-reasoned decision by District Judge Blumenfeld in footnote 4 of his decision in *Sykes* v. *Beal,* 392 F. Supp. 1089, to conclude that there is a continuing significant and recurring problem with respect to such litigation and the underlying fundamental issue of jurisdiction over the non-resident defendant. This, perforce, gives rise to the significant question of review of the interests of the *defendant* (the insured) which Mr. Justice Marshall, in his opinion in *Schaffer* v. *Heitner,* found to be of paramount importance.

It is respectfully submitted that the constitutional underpinnings of *Seider* v. *Roth* are mired in quicksand and the United States Court of Appeals for the Second Circuit in its effort to allow a resident plaintiff to have the benefit of his or her forum state has judicially stretched the notions of fair play to the point where the *defendant's* rights have been completely overlooked or have been tied to his

insurer who is not a party to the action and whose policy is the boot strap by which the plaintiff hales the defendant, the insured, into a foreign forum.

CONCLUSION

Fore the foregoing reasons a Writ of Certiorari should issue to review the order and opinion of the Court of Appeals, Second Circuit.

Respectfully submitted,

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